UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE RICHARD W. GOLDBERG, JUDGE

AD HOC SHRIMP TRADE ACTION COMMITTEE, Plaintiff, v. UNITED STATES, Defendant, and OCEANINVEST, S.A., Defendant-intervenor.	**PUBLIC** Court No. 08-229

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION
FOR JUDGMENT ON THE AGENCY RECORD UNDER RULE 56.2

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ORDER

Upon consideration of plaintiff's motion for judgment upon the administrative record, defendant's response, and all other pertinent papers, it is hereby

ORDERED that the final results are sustained; and it is further

ORDERED that judgment is entered in favor of the United States.

____
JUDGE

Dated: ____________, 2009
New York, NY

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AD HOC SHRIMP TRADE ACTION COMMITTEE,	**PUBLIC**
Plaintiff,	
v.	Court No. 08-229
UNITED STATES,	
Defendant,	
and	
OCEANINVEST, S.A.,	
Defendant-intervenor.	

DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE AGENCY RECORD UNDER RULE 56.2

Defendant, the United States, respectfully submits this response in opposition to the motion for judgment upon the agency record filed by plaintiff, the Ad Hoc Shrimp Trade Action Committee ("Ad Hoc"), contesting the final results of the Department of Commerce's ("Commerce's") antidumping duty administrative review of shrimp from Ecuador covering shrimp produced and exported by OceanInvest, S.A. ("OceanInvest"). Because the record supports Commerce's determination to utilize OceanInvest's reported cost of raw materials in conducting its antidumping duty analysis, and because Commerce did not depart from any practice, we respectfully request that the Court deny Ad Hoc's motion and enter judgment for the United States.

STATEMENT PURSUANT TO RULE 56.2

I. The Administrative Determination Under Review

The administrative determination under review is Certain Frozen Warmwater Shrimp from Ecuador: Final Results and Partial Rescission of Antidumping Duty Administrative Reviews, 73 Fed. Reg. 39,945 (Dep't of Commerce July 11, 2008). Commerce explained its conclusions in the accompanying decision memorandum.

II. Issue Presented For Review

Whether OceanInvest's reported cost of raw materials reasonably reflects costs associated with the production of peeled shrimp.

STATEMENT OF FACTS

Commerce initiated the second administrative review of the antidumping duty order covering shrimp from Ecuador, and Ad Hoc requested that Commerce initiate a sales below cost investigation of OceanInvest's home market sales. OceanInvest, an Ecuadorian producer of subject merchandise, responded to Commerce's cost of production questionnaire.

Commerce subsequently published the preliminary results of the administrative review. Certain Frozen Warmwater Shrimp from Ecuador: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review, 73 Fed. Reg. 12,115 (Dep't of Commerce Mar. 6, 2008). Commerce utilized OceanInvest's reported costs for its analysis. In its administrative case and rebuttal briefs, Ad Hoc contended that Commerce should reject OceanInvest's reported costs of raw material inputs as distortive.

Ad Hoc's contentions hinged upon discrepancies in the amount of finished merchandise as compared to the amounts of certain raw materials reflected in OceanInvest's records.

OceanInvest explained these discrepancies, stating that, "in a few instances during the [period of review] when purchasing raw material for value-added production, Oceaninvest [

]. Confidential Doc. ("CD") 50 at 1. Likewise, Oceaninvest stated: "[

]. Id. at 2.

Oceaninvest further reported that it "will also from time-to-time in its purchases for value-added production employ a raw material [

]." Id. at 3. Under this [ ], "in purchasing raw material for value-added production, if Oceaninvest believes [

]." Id.

Additionally, in its administrative rebuttal brief, Oceaninvest defended its [

], stating that "Oceaninvest responded honestly and completely in describing how it can utilize this classification methodology and [ ] to improve their yields . . ." CD 54 at 2.

Commerce analyzed whether this [ ] led to inaccuracies in the record. Specifically, Commerce found that, "in some instances, [ ]. OceanInvest classifies and records the purchased shrimp at [ ]. OceanInvest explains that this is beneficial for them because it allows them to [ ]." CD 59. Accordingly, Commerce accepted the costs reported by OceanInvest because they reflected OceanInvest's actual costs. Final Results, 73 Fed. Reg. at 39,948.

SUMMARY OF THE ARGUMENT

OceanInvest's reported raw material costs in its cost of production analysis were the actual costs incurred by OceanInvest. OceanInvest reported its cost of raw materials in accordance with Commerce's instructions, candidly explained the apparent discrepancies in its records, and Commerce was satisfied that the reported costs reflected OceanInvest's actual invoiced costs. Commerce therefore permissibly relied upon OceanInvest's reported costs as actual costs associated with the production and sale of subject merchandise as required by statute.

Moreover, the record belies Ad Hoc's allegations of inaccuracies with respect to the shrimp used to produce peeled shrimp, and Commerce followed its statutorily preferred standard cost methodology, and Ad Hoc's contrary claims are baseless.

ARGUMENT

I. Standard Of Review

"The specific factual findings on which [Commerce] relies in applying its interpretation are conclusive unless unsupported by substantial evidence." United States v. Eurodif S.A., 128

S. Ct. 878, 887, n.6 (2009); 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). Substantial evidence is also "less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966).

Furthermore, "it is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record." Timken Co. v. United States, 699 F. Supp. 300, 306 (Ct. Int'l Trade 1988), aff'd 894 F.2d 385 (Fed. Cir. 1990). Rather, when, as in this case, Congress has entrusted an agency to administer a statute in fact intensive situations, agency conclusions should be reversed only if the record contains evidence "so compelling that no reasonable factfinder" could reach the same conclusion. INS v. Elias- Zacarias, 502 U.S. 478, 483-84 (2002).

Lastly, Commerce's statutory "interpretation[s] govern[] in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous." Eurodif, 128 S. Ct. at 887 (citing United States v. Mead Corp., 533 U.S. 218, 229-230 (2001); Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837 (1984)).

II. OceanInvest's Reported Raw Material Costs Reflected The Actual Costs Associated With The Production Of Peeled Products

Commerce permissibly relied upon OceanInvest's reported costs because they were kept in accordance with home country generally accepted accounting principles ("GAAP") and reflected the actual costs associated with the production of peeled shrimp.

A. **Commerce Complied With The Antidumping Duty Statute**

Commerce imposes antidumping duties upon subject merchandise that "is being, or is likely to be, sold in the United States at less than fair value" to the detriment of a domestic industry. 19 U.S.C. § 1673. This antidumping duty is equal to the "amount by which the normal value exceeds the export price (or constructed export price) for the merchandise." Id. Normal value is "the price at which the foreign like product is first sold . . . in the exporting country." 19 U.S.C. § 1677b(a)(1)(B)(I). If normal value exceeds the price at which the goods are sold to an unaffiliated purchaser in the United States, that sale is dumped.

If Commerce possesses grounds to believe or suspect that home market sales of a foreign like product are made at prices below cost of production, it investigates and excludes from the normal value calculation those foreign sales made at below the cost of production. 19 U.S.C. § 1677b(b)(1). Cost of production is the sum of the cost of materials and fabrication; selling, general and administrative expenses; and packaging. 19 U.S.C. § 1677b(b)(3).

Cost of production "shall normally be calculated based upon the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

In conducting this analysis, Commerce determined that OceanInvest's reported material costs reasonably reflected the actual costs associated with the production of subject merchandise. Accordingly, Commerce followed the statute. 19 U.S.C. § 1677b(f)(1)(A).

B. Ad Hoc Fails To Demonstrate Distortion

Ad Hoc contends that OceanInvest's reported cost of peeled products were "inaccurately reported and unreliable" because OceanInvest could not have incurred the costs as reported, and did not report the same costs for all merchandise with generally the same physical characteristics. Ad Hoc Br. at 5-7. The record contains substantial evidence that Oceaninvest reported its cost of raw material purchases based upon the actual costs in its records, which accurately reflected costs associated with the subject merchandise as required by statute.

Ad Hoc does not assert that raw material costs are not based upon OceanInvest's records, or that those records are unaudited or not kept in accordance with home country GAAP. Rather, Ad Hoc contends only that OceanInvest's reported costs do not reasonably reflect the costs of producing peeled and shell off shrimp. However, OceanInvest reported its costs for the peeled shrimp using a product specific cost methodology that Commerce directed it to follow in its original and supplemental questionnaires. Decision Mem. at 10. Ad Hoc asserts that this methodology is unreasonable because the weight of the peeled shrimp can exceed the weight of the raw material input. Ad Hoc Br. at 7-9; but see id. at 10 (not disputing Commerce's conclusion that "the actual price paid for the shrimp in question was properly reflected in the reported raw material costs.").

During the course of this proceeding, Commerce analyzed OceanInvest's reported costs for peeled products and sent three supplemental questionnaires to address this issue. Decision Mem. at 10. Commerce found that OceanInvest's inventory tracking system tracks the mix of shrimp input sizes (including a mix of [ ] shrimp) that are used to produce each peeled product. Id. Therefore, Commerce determined that OceanInvest's records reflected the actual cost of the raw material inputs used to produce the peeled and shell off products.

In conducting its analysis, Commerce found that OceanInvest purchased shrimp for processing in a multitude of sizes with varying costs. Id. For a small percentage of total raw material purchases, OceanInvest purchased raw shrimp for peeled shrimp production at [.] CD 50, 54. OceanInvest recorded in its normal books and records and reported to Commerce the actual cost and count size of the raw materials as paid to their suppliers as reflected on the invoices, even though [ ] Id.

Commerce found during its examination of the reported costs and reported count sizes that peeled shrimp that fall into a particular count size can be produced using either one specific count size as a raw material input, or a combination of two or more different count sizes of raw shrimp (e.g., a combination of 31-35 count size and 36-40 count size raw shrimp can be used to produce 31-35 count size peeled shrimp). CD 59. Through such combinations, OceanInvest's records demonstrated that it was possible for a mix of input raw shrimp including [ ] shrimp to be used to produce a [ ] peeled product. For example, a bag of 35 shrimp may weigh exactly one pound and would be classified as 31-35 count. However, that bag of shrimp would contain individual shrimp that would individually be considered 36-40 count. After examination of OceanInvest's responses, Commerce found that, although the different sizes or mix of raw material inputs could result in a larger finished product, the inventory system tracked both the input shrimp size and the input shrimp cost on an actual, as invoiced basis to ensure that the final recorded costs accurately reflected the prices paid for the inputs. Decision

Mem. at 10-11. This fact, which Ad Hoc concedes, Ad Hoc Br. at 10, was critical to Commerce's acceptance of OceanInvest's raw material costs.

According to Ad Hoc, the conduct of these transactions should render OceanInvest's reporting inaccurate. Ad Hoc Br. at 7. However, pursuant to Commerce's statutory construction, if Commerce receives data that contain the actual costs incurred, the conduct of those transactions is irrelevant. Here, OceanInvest satisfied Commerce that its costs were not distortive because "the costs captured in the reported costs are the amounts actually paid by OceanInvest for its raw material shrimp inputs." Decision Mem. at 11. Furthermore, the record evidence demonstrates that this purchasing practice affected only two control numbers (CONNUMs). CD 34 at Ex. SD-11; CD 42 at Ex. 2SD-6. These two control numbers represent only [ ] percent of the [ ] individual reported peeled CONNUMs, and further, peeled products as a whole account for only [ ] percent of total shrimp production for OceanInvest during the period of review. Id.

Based upon OceanInvest's ability to tie and reconcile the reported costs on a product-specific basis, and the fact that the transactions about which Ad Hoc complains were infrequent, Commerce permissibly accepted OceanInvest's reported information based upon its normal books and records, without further adjustment to calculate an antidumping margin. Therefore, based upon record evidence that OceanInvest tracked the raw material input count size and the related cost, as well as the finished product count size, Commerce determined that OceanInvest reasonably reported the actual cost of the raw material inputs needed to produce the peeled products and that these costs were not distortive.

Ad Hoc attempts to cast further doubt upon the accuracy of OceanInvest's reporting by asserting that "it is not sufficient for a respondent to accurately report its aggregate costs only, but must also accurately report its product-specific costs." Ad Hoc Br. at 10. This contention misstates both Commerce's cost methodology and the record. Commerce accepted OceanInvest's reported costs not only because they were reported accurately on an aggregate basis, but also because OceanInvest followed Commerce's instructions and reported product specific costs (that is, model specific costs) accurately. Commerce requires respondents to report an "average cost . . . for each raw shrimp input in calculating" the total cost of production, but this does not mean that Commerce uses only aggregate costs. Decision Mem. at 11. Rather, OceanInvest reported the model-specific raw material and overhead costs actually incurred during the period of review for each reported category of products based upon the unique physical characteristics of each product, and Commerce found that OceanInvest reported its purchases of raw shrimp inputs based upon a range of sizes, and that the peeled products may be produced using a mix of different input sizes. CD 59. As Commerce explained, OceanInvest's inventory system specifically tracked the mix of actual shrimp count size inputs used to produce each finished product, and OceanInvest used the actual period of review average shrimp costs by raw input count size for each finished count size to report costs to Commerce. Decision Mem. at 11. This complies with the statutory mandate to rely upon records that "reasonably reflect the costs associated with the production and sale of the merchandise." 19 U.S.C. § 1677b(f)(1)(A).

Ad Hoc also asserts that all of OceanInvest's products with identical physical characteristics should have the same reported raw material cost. Plaintiff's Brief at 13. The record demonstrates otherwise. Rather, OceanInvest tracked and used different mixes of raw shrimp count sizes as inputs to produce the same peeled products (differentiated only by the packaging material used to sell the finished product). Decision Mem. at 11; CD 50. For example, with respect to the merchandise about which Ad Hoc complains at footnote 6 of its brief, the record shows the specific mix of shrimp inputs and costs that were used to produce CONNUM 120813221310320131 during the period of review. CD 42 at Ex. 2SD-6. Specifically, OceanInvest used [ ] pounds of count size [ ] raw shrimp inputs, and [ ] pounds of count size [ ] raw shrimp inputs to produce [ ] pounds of a finished peeled product that represented a [ ] count size. Id. Whereas, as shown in the same exhibit, CONNUM 120813221310400131 (with the only difference between the two CONNUMs being container weight), with a finished product count size of [ ], was produced entirely from input shrimp of count size [ ]. Id. Consistent with Commerce's normal practice, OceanInvest reported a period of review average cost for each shrimp input count size in calculating the cost of production. The different mix of shrimp inputs used to produce the same size end product accounts for the reported cost differences questioned by Ad Hoc.

C. **Commerce Did Not Depart From Past Practice**

Ad Hoc further contends that Commerce's acceptance of the reported data was a surprise change in practice from the first administrative review. Ad Hoc. Br. at 11-12. Commerce followed its longstanding practice of requiring respondents to report costs on a product specific basis and also of relying upon the respondent's normal books and records if kept in accordance with home country GAAP. See Elkem Metals Co. v. United States, 468 F.3d 795, 802 (Fed. Cir. 2006) (sustaining Commerce's reliance upon respondent's reported costs when not distortive and kept in accordance with GAAP); Aimcor v. United States, 69 F. Supp. 2d 1345, 1350 (Ct. Int'l

Trade 1999) (sustaining Commerce's use of the respondent's reported costs found to be accurate and a reasonable reflection of the company's actual experience); FAG U.K. Ltd. v. United States, 945 F. Supp. 260, 271 (Ct. Int'l Trade 1996). Commerce accepted OceanInvest's reported costs in this period because those costs comported with Commerce's practice, which is the statutorily preferred methodology pursuant to 19 U.S.C. § 1677b(f)(1)(A).

CONCLUSION

For these reasons, we respectfully request that the Court sustain the final results and enter judgment for the United States.

Respectfully submitted,

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March 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2009, I electronically filed and served by mail copies of "DEFENDANT'S RESPONSE TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE AGENCY RECORD UNDER RULE 56.2," addressed as follows:

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